Supreme Court, U.S.
FILED

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

CASE NO. _____

RAYMOND WIZBOWSKI AND BARBARA WIZBOWSKI,

PETITIONERS,

v.

COMMISSIONER OF INTERNAL REVENUE,

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI
FROM THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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26 pp

STATEMENT OF QUESTIONS PRESENTED

Whether petitioners' representation, by an attorney with a **substantial** financial interest in the outcome of the case below, constitutes a fraud on the court, when that attorney's financial interest is adverse to those of the client.

Whether the Courts below erred in not considering the conduct of Harris in making its determination as to whether fraud on the court occurred in the United States Tax Court proceedings.

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In The Supreme Court of the United States

October Term, 1994

Case No. _____

RAYMOND WIZBOWSKI AND BARBARA WIZBOWSKI,

PETITIONERS,

v.

COMMISSIONER OF INTERNAL REVENUE,

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI
FROM THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Law Office of Anthony P. Capozzi, on behalf of Petitioners Raymond V. Wizbowski and Barbara Wizbowski, respectfully petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in

this case.

OPINIONS BELOW

Petitioners filed a motion for leave to file a motion to vacate a Tax Court decision on November 21, 1991. Petitioners' motion was denied by a Tax Court order of April 4, 1992. (Appendix 5.) Petitioners Raymond V. and Barbara Wizbowski seek review of a decision by the Ninth Circuit Court of Appeal affirming the decision of the Tax Court. (Appendix 1.)

JURISDICTIONAL STATEMENT

On November 29, 1993 the Ninth Circuit Court of Appeal affirmed the decision by the Tax Court denying Petitioners' request for leave to file a motion to vacate a prior tax court decision. (Appendix 1.) On December 15, 1993 Petitioners' filed a Petition for Rehearing of the November 29, 1993 Ninth

Circuit Court of Appeal decision. (Appendix 10.) On May 3, 1994 the Court of Appeal denied the petition for rehearing. (Appendix 9.)

The jurisdiction of this court is invoked pursuant to Title 28, United States Code section 1254(1).

STATEMENT OF THE CASE

In 1977, Petitioners invested in Sun Belt Partners (Sun Belt), a California partnership. Sun Belt was a partnership organized and promoted by Thomas Harris (Harris). (CR 6)[1] Through their involvement in Sun Belt, Petitioners' claimed partnership losses of $60,246 and $59,941, for the 1977 and 1978 taxable years,

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[1] "CR" reference are to the docket control numbers assigned to the documents in the original record by the Clerk of the Tax Court. "RT" references are to the reporter's transcript of the proceedings of the March 17, 1992, hearing on petitioners' motion to vacate.

respectively, based on Sun Belt's purchase of a mobile home park. (CR 1 Ex. A).

In August of 1984, Petitioners engaged the services of T. Dean Hawkins to represent them in United States Tax Court proceedings concerning the 1977 and 1978 deficiencies. (CR 17) Hawkins timely petitioned the United States Tax Court for redetermination of the Petitioners' tax deficiencies. (CR 1) The United States Tax Court had jurisdiction over Petitioners' original petition pursuant to Title 26 U.S.C. Section 7442.

Petitioners' case was consolidated for trial with seven other cases, all involving taxpayers who had invested in Sun Belt. (CR 4) The other taxpayers were represented by Harris, Sun Belt's organizer and promotor. The issue at trial was whether Sun Belt had entered into a bona fide purchase of the mobile home

park, thereby allowing Sun Belt, as owner, to claim certain losses. (CR 6) Hawkins presented taxpayers' case in conjunction with Harris' presentation of the other taxpayers' cases. (CR 6.)

At trial, Petitioner Mrs. Wizbowski explained that she had sold her partnership interest in Sun Belt because she had become "totally estranged" from Harris, the promoter. Mrs. Wizbowski also testified that Harris had mishandled some of the Wizbowskis' pension money in an incident unrelated to the partnership in which Petitioners had invested. (CR 6 at 74).

After trial, the United States Tax Court issued a Memorandum Opinion finding that Sun Belt's purported purchase of the mobile home park was a sham transaction. (CR 13). The United States Tax Court decision originally was entered on June

13, 1986. (CR 14.) It was subsequently vacated and reentered to correct a typographical error on July 8, 1986. (CR 15.) Pursuant to 26 U.S.C. section 7481 and 7483, the decision of the United States Tax Court became final 90 days later, on October 6, 1986.

On November 12, 1991, Petitioners filed a motion to vacate the prior tax court decision. (CR 17.) Petitioners motion alleged that the attorneys for Petitioners committed a "fraud upon the court" within the meaning of Toscano v. Commissioner, 441 F.2d 930 (9th Cir. 1971). (CR 17 at 2.) Petitioners contended that, at the time Hawkins represented them in the United States Tax Court, he had an outstanding offer with the I.R.S. wherein he would be permitted to return to work at the Internal Revenue Service. (CR 17 at 2.)

The United States Tax Court held an evidentiary hearing on taxpayers' motion to vacate. Petitioner Mrs. Wizbowski testified at the hearing that Hawkins conflict of interest in returning to work with the I.R.S. affected his representation of Petitioners during the course of the Tax Court proceedings. (RT 42-45).

At Petitioners' hearing it was adduced through Hawkins that he had an agreement with Harris to take the lead in the United States Tax Court trial. (RT 24) Hawkins knew when the agreement was made that Harris had put together the sales of the partnerships, which sales were at issue in the United States Tax Court proceedings. (RT 24.) However, at the time that Hawkins allowed Harris to take the lead in the case, he testified that he did not know if he understood the full extent

of Harris' involvement. (RT 25.) Hawkins further testified that as a result, he did not understand if the Petitioners, and all of the other taxpayers who were represented by Harris, were to lose the United States Tax Court case, that Mr. Harris would then be entitled to personal deductions for the claims at issue. (RT 25.)

At the hearing, Petitioner Mrs. Wizbowski testified that she would never tell Hawkins to rely on attorney Harris in representing you in the United States Tax Court case because she was very upset with Harris and had a major conflict with Harris. (RT 42) Mrs. Wizbowski testified that this conflict arose when Harris took $50,000 out of the Petitioners' pension fund. Although the situation with Harris had been resolved prior to the United States Tax Court trial, Petitioners were

not on good terms with Harris prior to the United States Tax Court trial. Petitioner further testified that after this incident with Harris, she could not trust him. (RT 43.)

Despite acknowledging that United States Tax Court Rule 24(f), dealing with conflicts of interest, would apply to Harris, (RT 97) on April 24, 1994, the United States Tax Court denied Petitioners' motion for leave to vacate the 1986 United States Tax Court decision. (Appendix 5.)

On May 12, 1992, Petitioners filed a Notice of Appeal to the Ninth Circuit Court of Appeal. (CR 29.) The United States Tax Court's order denying the motion to vacate was an appealable order pursuant to Section 7459 of the Code. The Court of Appeal had jurisdiction under Section 7482 of the Code.

The Ninth Circuit Court of Appeal affirmed the decision of the United States Tax Court for Petitioners' failure to demonstrate a fraud upon the court. The Ninth Circuit Memorandum Opinion was filed November 29, 1993. (Appendix 1.)

On December 15, 1993, Petitioners filed a Petition for Rehearing before the Ninth Circuit Court of Appeal. (Appendix 10.) Petitioners' requested a rehearing due to the Appellate Court's failure to examine Harris' conflict of interests in deciding whether or not there was fraud on the court in the 1986 United States Tax Court trial. Petitioners argued that by overlooking the material fact of attorney Harris' misconduct, the Court failed to apply the principles enunciated in the Ninth Circuit opinion of Alexander v. Robinson, 882 F.2d 421, (9th Cir. 1989). Petitioners' request for a rehearing was

denied on May 3, 1994. (Appendix 9.)

REASONS FOR GRANTING THE PETITION

The refusal of the courts below to consider whether Harris' representation of the Petitioners constitutes fraud on the court is clear error. Despite a recognition of the United Staets Tax Court that Harris' representation of Petitioners' violated United States Tax Court Rule 24(f), that court, as well as the Court of Appeal refused to consider this factor in determining whether or not the 1986 United States Tax Court decision was procured through fraud on the court.

The clear error of the United Staes Tax Court, in condoning Harris' representation of the Petitioners, and the sanctioning of such judicial conduct by the Court of Appeal call for an exercise of this Court's power of jurisdiction.

Once a decision of the United States

Tax Court has become final as defined in Section 7481 of the Internal Revenue Code, it is well settled, as a general rule, that neither the United States Tax Court nor any other court has jurisdiction to reconsider that decision unless the rendering thereof was the product of fraud upon the court. Lask v. Commissioner, 352 U.S. 1027 (1957) (per curiam), aff'd 235 F.2d 97 (9th Cir. 1956); R. Simpson & Co. v. Commissioner, 321 U.S. 225 (1944); Helvering v. Northern Coal Co., 293 U.S. 191 (1934); Abatti v. Commissioner, 859 F.2d 115, 117 (9th Cir. 1988); Toscano v. Commissioner, 441 F.2d 930 (9th Cir. 1971); Hanover Insurance Co. v. United States 880 F.2d 1503 (1st Cir. 1989), cert. denied, 110 S.Ct. 726 (1990); Kenner v. Commissioner, 387 F.2d 689, 690 (7th Cir. 1968).

Rule 24(f) of the Tax Court Rules of

Practice and Procedure state as follows:

> (f) Conflict of Interest. If any counsel of record (1) was involved in planning or promoting a transaction or operating an entity that is connected to any issue in a case (2) represents more than one person with differing interests with respect to any issue in a case or (3) is a potential witness in a case, then such counsel must either secure the informed consent of the client (but only as to (1) and (2)); withdraw from the case; or take whatever other steps are necessary to obviate a conflict of interest or other violation of the ABA Model Rules of Professional Conduct, and particularly Rules 1.7, 1.8, and 3.7 thereof. The Court may inquire into the circumstances of counsel's employment in order to deter such violations.

Rule 1.7 of the ABA Model Rules of Professional Conduct provides that a lawyer is prohibited from representing a client if the representation of that client will be directly adverse to another client, or the representation of that client may be materially limited by the lawyer's responsibilities to another

client, third parties or the lawyer's own interest.

Harris' representation of the Petitioner's in the 1986 United States Tax Court proceedings constituted a clear conflict of interest and a fraud on the court. Hawkins allowed Harris to take the lead at the United States Tax Court trial. Harris was the creator and promotor of the partnerships involved in the 1986 United States Tax Court proceedings. Petitioner, Mrs. Wizbowski, testified that due to a prior involvement with Harris, Petitioners did not trust him, and would not have involved Harris in their representation.

Harris, as promotor of the partnerships, had his own personal financial interest in the outcome of the United States Tax Court proceedings which was adverse to those of the Petitioners. The main person who could benefit by

Petitioners losing the United States Tax Court case was the lead attorney, Harris. Harris would benefit by the United States Tax Court's determination that the investors had phantom deductions. Harris would then be in a position to show the phantom income from the transaction as bogus, file amended returns claiming an overstatement of income, and requesting a refund. Harris further benefitted from the United States Tax Court decision declaring the partnership transactions as "shams" by retaining sole possession of the property and then selling it at a profit.

It is submitted that the conflicts of interest present in Harris' representation of the Petitioners in the 1986 United States Tax Court proceedings, along with Harris' adverse financial interest in the outcome of the litigation, undeniably constitute a fraud on the court.

Fraud on the court sufficient to justify setting aside a final decision of the United States Tax Court has been defined by the Ninth Circuit as follows:

> "Fraud on the court" should we believe embrace only that species of fraud which does, or attempts to, defile the court itself or is fraud perpetuated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases that are presented for adjudication. Toscano v. Commissioner, 441 F.2d 930, 933 (9th Cir. 1971).

In Bulloch v. United States, 763 F.2d 1115, 1121 (10th Cir. 1985), the court held that fraud on the court is "fraud which directed to the judicial machinery itself and is not fraud between the parties or fraudulent documents, false statements or perjury." Harris' personal financial interest in the outcome of the 1986 United States Tax Court case was not only a fraud perpetuated by an officer of the court, it so affected the judicial

process in this case that the United States Tax Court could not have impartially adjudged the case below. The United States Tax Court itself recognized that Harris' representation of the Petitioners violated Rule 24(f) of the United States Tax Court Rules of Practice and Procedure.

As set forth in Alexander v. Robertson, 882 F.2d 421, 424 (9th Cir. 1989), fraud upon the court is clearly not limited to fraud committed by an "adverse" party. Nor does it require a showing that the party was prejudiced by the misconduct. The Supreme Court has defined fraud on the court in terms of whether the alleged misconduct "harms" the integrity of the judicial process. Hazel-Atlas Glass Co. v. Hartford Empire Co., 322 U.S. 238, 246, 64 S.Ct. 997, 1001, 88 L.Ed 1250 (1944). Furthermore, "since attorneys are

officers of the court, their conduct, if dishonest, would constitute fraud on the court." Kupferman v. Consol. Research & Mfg. Corp., 459 F.2d 1072, 1079 (2d Cir. 1972).

Harris' conduct in the 1986 United States Tax Court proceedings was entirely ignored by the courts below in determining whether fraud on the court existed in the United States Tax Court proceedings.

CONCLUSION

The 1986 United States Tax Court proceedings were procured through fraud on the court, and as such, must be vacated. In denying Petitioners' Motion for Leave to File a Motion to Vacate, the United States Tax Court ignored Harris' obvious conflict of interest. Likewise, the Ninth Circuit Court of Appeal erred in refusing to consider Harris' conduct.

Harris' conduct in the 1986 United

States Tax Court proceedings clearly constituted a fraud on the court in no uncertain terms. The courts below committed clear error in refusing to take into consideration Harris' conflict of interest and adverse substantial financial stake in the litigation.

Dated: _____

Respectfully Submitted,

LAW OFFICES OF ANTHONY P. CAPOZZI

By: _____
ANTHONY P. CAPOZZI
Attorneys for Petitioners
RAYMOND WIZBOWSKI AND
BARBARA WIZBOWSKI

Supreme Court, U.S.
FILED

94 396 AUG - 1 1994

OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

CASE NO. _____

RAYMOND WIZBOWSKI AND BARBARA WIZBOWSKI,

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COMMISSIONER OF INTERNAL REVENUE,

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APPENDIX

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RAYMOND V. WIZBOWSKI; WIZBOWSKI,	)	No. 92-70365
	)	IRS NO. 13864-84
Petitioner-Appellants,	)	
v.	)	
	)	**MEMORANDUM**[1]
COMMISSIONER INTERNAL REVENUE SERVICE,	)	
Respondent-Appellee.	)	

Appeal from a Decision of the
United States Tax Court

Submitted November 1, 1993[2]
San Francisco, California

Before: **KOZINSKI** and **O'SCANNLAIN**, Circuit Judges; **KELLEHER**[3] District Judge.

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[1]This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit R. 36-3.

[2]The panel unanimously finds this case suitable for submission on the record and briefs and without oral argument. Fed. R. App. P. 34(a), Ninth Circuit R. 34-4.

[3]The Honorable Robert J. Kelleher, Senior United States District Judge

Appellants Raymond and Barbara Wizbowski (the "Wizbowskis") seek to vacate a July 8, 1986 decision by the Tax Court assessing deficiencies against them for the 1977 and 1978 tax years (the "1986 Decision"). The Wizbowskis filed a motion for leave to file a motion to vacate this decision with the Tax Court. The Tax Court denied the Wizbowskis' motion. We have jurisdiction under 26 U.S.C. section 7482, and we affirm.

I

Decisions of the Tax Court become final within ninety days where no appeal is taken. 26 U.S.C. sections 7481, 7483. Because the Tax Court has limited jurisdiction and lacks general equitable powers, it lacks jurisdiction to vacate a final decision that it has made unless the decision was procured through a fraud upon the court or a mutual mistake. Abatti v. C.I.R., 859 F.2d 115, 117, 118 (9th Cir. 1988). The Wizbowskis allege that the 1986 Decision resulted from a fraud upon the court. We review de novo the Wizbowskis' claim. Id. at 117.

The Wizbowskis fail to demonstrate that the 1986 Decision was procured through a fraud upon the court. The "fraud on the court" doctrine is construed "narrowly, in the interests of preserving the finality of judgments" Toscano v. C.I.R., 441 F.2d 930, 934 (9th Cir. 1971). Fraud on the court "must involve an

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for the Central District of California, sitting by designation.

unconscionable plan or scheme which is designed to improperly influence the court in its decision." Abatti, 859 F.2d at 118. A fraud upon a party generally is not a fraud upon the court. Anderson v. C.I.R., 693 F.2d 844, 846 (9th Cir. 1979).

II

The Wizbowskis' claim that their attorney represented them under a conflict of interest does not allege a fraud upon the court. In a case closely resembling the instant one, Kenner v. C.I.R., 387 F.2d 689 (7th Cir. 1968), taxpayers sought to vacate a final order of the Tax Court, claiming that their attorney had become chief counsel of the Internal Revenue Service ("IRS") after representing them before the Tax Court. The court rejected the taxpayers' appeal, holding that "even assuming impropriety in [the attorney's] conduct . . .[,] the facts alleged do not indicate that there was fraud on the tax court." Id. at 692. Similarly, in Anderson, plaintiffs alleged that they had been misled by their tax advisors in support of their motion to vacate a final Tax Court assessment of a deficiency. This court rejected their claim, holding that any deception by the advisors was "fraud practiced upon the taxpayers but not upon the Tax Court." 693 F.2d at 846.

The Wizbowskis claim that their attorney operated under a conflict of interest because he rejoined the IRS after he represented them before the Tax Court. The Wizbowskis do not controvert evidence produced by the appellee demonstrating that, at the time he represented the

Wizbowskis, their attorney had little expectation that he would return to work at the IRS and had not received an offer of employment or promise of future employment. Their claim thus is little more than pure speculation. Further, to the extent that there was any conflict of interest, this did not involve a plan or scheme to defraud the court. Any conflict at most would be a fraud upon only the Wizbowskis, not the court. Kenner, 387 F.2d at 689; Anderson, 693 F.2d at 846.

III

The Wizbowskis thus fail to demonstrate a fraud upon the court permitting the Tax Court to vacate the 1986 Decision. Having resolved the merits of the appeal against the Wizbowskis, it is unnecessary for the court to reach the question of whether the Wizbowskis' motion for leave to file was filed in a timely manner. The decision of the Tax Court is AFFIRMED.

FILED: November 29, 1993.

UNITED STATES TAX COURT
WASHINGTON, D.C. 20217

RAYMOND V. AND BARBARA WIZBOWSKI,	Docket No. 13864-84
Petitioners,	
v.	
COMMISSIONER OF INTERNAL REVENUE,	
Respondent.	

O R D E R

Decision in this case was entered July 8, 1986, pursuant to our opinion in Steinert, et al. v. Commissioner, T.C. Memo. 1985-581, filed November 27, 1985. Said decision became final 90 days thereafter, in accordance with sections 7481(a) and 7483, Internal Revenue Code.

On November 12, 1991, petitioners filed a Motion for Leave to File a Motion to Vacate this Court's Decision Pursuant to Rule 162 of the United States Tax Court. Said motion alleges that the attorney for petitioners committed a "fraud upon the court" within the meaning of Toscano v. Commissioner, 441 F.2d 930 (9th Cir. 1971). Respondent's Memorandum in Opposition to Petitioners' Motion for Leave to File a Motion to Vacate this Court's Decision Pursuant to Rule 162 of the United States Tax Court was filed January 22, 1992. Hearing on the motion was held on March 17, 1992, in Pasadena,

California. Petitioners' Memorandum Re Evidentiary Hearing was filed on April 21, 1992.

Petitioners presented evidence that their former attorney, T. Dean Hawkins (Hawkins), was employed by the Internal Revenue Service both before and after his representation of them in this case. According to the testimony, petitioners learned in 1987 or 1988 that, after Hawkins left his initial employment with the Internal Revenue Service, he retained an expectation that he would be reemployed by the Internal Revenue Service when an opening occurred in Modesto, California. There is no evidence, however, that Hawkins actually had an outstanding offer of employment from the Internal Revenue Service at the time he represented petitioners in this case, and the preponderance of the evidence negates such an outstanding offer. There is no evidence that Hawkins' expectations about future reemployment by the Internal Revenue Service affected his performance on behalf of petitioners in this case. There is no evidence that respondent's counsel in this case was aware of Hawkins' expectations or that respondent received any advantage in this case as a result of Hawkins' expectations.

The Court of Appeals for the Ninth Circuit has said that fraud on the Court may occur when the acts of a party prevent his adversary from fully and fairly presenting his case or defense. Abatti v. Commissioner, 859 F.2d 115, 118 (9th Cir. 1988), affg. 86 T.C. 1319 (1986). A lawyer's inadequate or improper repre-

sentation of his own client is not a fraud on the Court and does not justify setting aside a final decision. Chao v. Commissioner, 92 T.C. 1141, 1144 (1989). In Toscano v. Commissioner, supra, relied on by petitioners, the lawyer's conflict of interest inured in favor of one client and to the disadvantage of the other. There is no such evidence in this case.

Moreover, we do not believe that petitioners would be able to secure any different or other result in this case if our prior decision were vacated. It would be unfair to respondent, to the Court, and to other taxpayers to reopen this case at this time; and petitioners' delay in bringing their motion exacerbated those difficulties. See Chao v. Commissioner, supra at 1144-1145. The petition in this case was filed in 1984 and disputed petitioners' tax liabilities for 1977 and 1978. Even if evidence not presented at trial previously existed, it would be stale or nonexistent by now. In an analogous situation, if petitioners were seeking a new trial in a case where decision was not final, the Court would refuse to consider belatedly tendered evidence without a showing of due diligence. See, e.g., Boryan v. United States, 884 F.2d 767, 771 (4th Cir. 1989); and Pietanza v. Commissioner, T.C. Memo. 1990-524, affd. without published opinion 935 F.2d 1282 (3d Cir. 1991). See also Lewis v. Commissioner, 90 T.C. 1044, 1053 (1988); Law v. Commissioner, 84 T.C. 985, 990-993 (1985); and Manzoli v. Commissioner, T.C. Memo. 1989-94, affd. 904 F.2d 101 (1st Cir. 1990), with respect to belated attempts to raise new issues.

We are entitled to consider such prejudicial delay even where taxpayers have not had their day in court. See Montgomery v. Commissioner, 367 F.2d 917 (9th Cir. 1966); Lewis v. Commissioner, supra at 1051; Brooks v. Commissioner, 82 T.C. 413, 429-430 (1984), affd. without published opinion 772 F.2d 910 (9th Cir. 1985); and Koufman v. Commissioner, 69 T.C. 473, 476-477 (1977). In this case, petitioners actually testified during the prior trial, and material facts concerning their case were known to them if not to Hawkins. We are persuaded that they had their day in Court.

Upon due consideration and for reasons more fully set forth in the transcript of proceedings of March 17, 1992, it is hereby

ORDERED: That petitioner' Motion for Leave to File a Motion to Vacate this Court's Decision Pursuant to Rule 162 of the United States Tax Court, filed November 12, 1991, is denied.

(Signed) /s/ Mary Ann Cohen
Mary Ann Cohen, Judge

Dated: Washington, D.C., April 24, 1992.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RAYMOND V. WIZBOWSKI; BARBARA WIZBOWSKI,	)	No. 92-70365
	)	IRS NO. 13864-84
Petitioners-Appellants,	)	
v.	)	
	)	**ORDER**
COMMISSIONER INTERNAL REVENUE SERVICE,	)	
Respondent-Appellee.	)	

Before: **KOZINSKI** and **O'SCANNLAIN**, Circuit Judges; **KELLEHER**[1] District Judge.

Appellant's petition for rehearing is DENIED.

FILED: May 3, 1994.

[1]The Honorable Robert J. Kelleher, Senior United States District Judge for the Central District of California, sitting by designation.

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RAYMOND V. and BARBARA WIZBOWSKI,	Case No. 92-70365
Plaintiffs,	Tax Court No. 13864-84
v.	
COMMISSION OF INTERNAL REVENUE,	
Defendant.	

PETITION FOR REHEARING

RE MEMORANDUM FILED NOVEMBER 29, 1993,
RE FROM APPEAL FROM A DECISION OF
THE UNITED STATES TAX COURT

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I.

INTRODUCTION

Appellant Raymond V. and Barbara Wizbowski ("Appellants") respectfully petition this Honorable Court for a rehearing of the appeal in the above-entitled cause pursuant to Federal Rules of Appellate Procedure, Rule 40.

The present petition is addressed solely to material points of fact and law which Appellants believe the court overlooked in issuing it's judgment of November 29, 1993, which affirmed the decision of the Tax Court. (See Ex. 1 attached hereto.)

Therefore this petition is devoted to convincing this court that it has erred in its determination of whether or not the appellant's representation by attorneys Hawkins and Harris in the Tax Court proceedings, constitute "fraud on the court" sufficient to vacate the Tax Court decision entered on July 8, 1986.

II.

ARGUMENT

A. THE COURT OVERLOOKED THE FACTS OF ATTORNEY MISCONDUCT BY HAWKINS AND HARRIS WHEN IT RULED THAT FRAUD ON THE TAX COURT WAS NOT PRESENT IN THE PROCEEDING BELOW

Section II, pages 2 and 3 of the printed opinion of this court states that

the Wizbowskis' claim of a conflict of interest by their attorney "Hawkins," because he rejoined the IRS after he represented them before the Tax Court, does not constitute a fraud on the court which would justify setting aside the judgment of the Tax Court.

Appellants' argument that fraud on the court existed in the Tax Court proceedings was not premised solely upon the claim that their attorney Hawkins possessed a conflict of interest. Appellants also argued that attorney misconduct, by both Hawkins and Harris, consisting of breaches of duty, violations of ethical rules, and nondisclosures by attorneys Hawkins and Harris constitute a fraud on the court as defined in Alexander v. Robinson, 882 F.2d 421, (9th Cir. 1989).

The material fact thus overlooked by this court in it's judgment dated November 29, 1993, is that a finding of fraud on the court is presented by Hawkins and Harris' breach of fiduciary duties, violations of ethical rules, and non-disclosures. Only Hawkins' conflict of interest in I.R.S. employment subsequent to his representation of the Appellants in the Tax Court proceedings was considered by this court in determining whether "fraud on the court" existed. By overlooking the material fact of attorney misconduct by both Harris and Hawkins, this court did not consider whether the facts presented by Appellants Tax Court representation constitutes "fraud on the court" under the principles of Alexander v. Robinson, supra.

B. BY FOCUSING ONLY ON HAWKINS CONFLICT OF INTEREST, THIS COURT OVERLOOKED THE APPLICATION OF THE NINTH CIRCUIT OPINION OF ALEXANDER v. ROBINSON

Appellants argued that a fraud on the court occurred not only through Hawkins conflict of interest, but also through attorney misconduct of both Hawkins and Harris during the course of Appellants Tax Court representation. This fact was not considered by this court in it's judgment affirming the decision of the Tax Court.

This court concludes on page 3 of it's opinion that Hawkins' representation of Appellants under a conflict of interest does not constitute a fraud upon the court under Kenner v. C.I.R., 387 F.2d 689 (7th Cir. 1968) and Anderson v. C.I.R., 693 F.2d 844 (9th Cir. 1979). The application of attorney misconduct as constituting fraud on the court under Alexander v. Robinson, 882 F.2d 421 (9th Cir. 1989) is not addressed by the court.

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III.

CONCLUSION

For the foregoing reasons, this petition for rehearing should be granted.

Dated: December 13, 1993.

LAW OFFICES OF ANTHONY P. CAPOZZI

By: _____
Janene R. Weber
Attorneys for Plaintiffs
Raymond and Barbara Wizbowski

FILED: December 15, 1993.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RAYMOND V. WIZBOWSKI; WIZBOWSKI,	)	No. 92-70365
	)	IRS NO. 13864-84
Petitioner-Appellants,	)	
v.	)	
	)	**MEMORANDUM**[1]
COMMISSIONER INTERNAL REVENUE SERVICE,	)	(EXHIBIT 1 TO PETITION FOR REHEARING)
Respondent-Appellee.	)	

Appeal from a Decision of the
United States Tax Court

Submitted November 1, 1993[2]
San Francisco, California

Before: **KOZINSKI** and **O'SCANNLAIN**, Circuit Judges; **KELLEHER**[3] District Judge.

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[1]This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit R. 36-3.

[2]The panel unanimously finds this case suitable for submission on the record and briefs and without oral argument. Fed. R. App. P. 34(a), Ninth Circuit R. 34-4.

[3]The Honorable Robert J. Kelleher, Senior United States District Judge

Appellants Raymond and Barbara Wizbowski (the "Wizbowskis") seek to vacate a July 8, 1986 decision by the Tax Court assessing deficiencies against them for the 1977 and 1978 tax years (the "1986 Decision"). The Wizbowskis filed a motion for leave to file a motion to vacate this decision with the Tax Court. The Tax Court denied the Wizbowskis' motion. We have jurisdiction under 26 U.S.C. section 7482, and we affirm.

I

Decisions of the Tax Court become final within ninety days where no appeal is taken. 26 U.S.C. sections 7481, 7483. Because the Tax Court has limited jurisdiction and lacks general equitable powers, it lacks jurisdiction to vacate a final decision that it has made unless the decision was procured through a fraud upon the court or a mutual mistake. Abatti v. C.I.R., 859 F.2d 115, 117, 118 (9th Cir. 1988). The Wizbowskis allege that the 1986 Decision resulted from a fraud upon the court. We review de novo the Wizbowskis' claim. Id. at 117.

The Wizbowskis fail to demonstrate that the 1986 Decision was procured through a fraud upon the court. The "fraud on the court" doctrine is construed "narrowly, in the interests of preserving the finality of judgments" Toscano v. C.I.R., 441 F.2d 930, 934 (9th Cir. 1971). Fraud on the court "must involve an

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for the Central District of California, sitting by designation.

unconscionable plan or scheme which is designed to improperly influence the court in its decision." Abatti, 859 F.2d at 118. A fraud upon a party generally is not a fraud upon the court. Anderson v. C.I.R., 693 F.2d 844, 846 (9th Cir. 1979).

II

The Wizbowskis' claim that their attorney represented them under a conflict of interest does not allege a fraud upon the court. In a case closely resembling the instant one, Kenner v. C.I.R., 387 F.2d 689 (7th Cir. 1968), taxpayers sought to vacate a final order of the Tax Court, claiming that their attorney had become chief counsel of the Internal Revenue Service ("IRS") after representing them before the Tax Court. The court rejected the taxpayers' appeal, holding that "even assuming impropriety in [the attorney's] conduct . . .[,] the facts alleged do not indicate that there was fraud on the tax court." Id. at 692. Similarly, in Anderson, plaintiffs alleged that they had been misled by their tax advisors in support of their motion to vacate a final Tax Court assessment of a deficiency. This court rejected their claim, holding that any deception by the advisors was "fraud practiced upon the taxpayers but not upon the Tax Court." 693 F.2d at 846.

The Wizbowskis claim that their attorney operated under a conflict of interest because he rejoined the IRS after he represented them before the Tax Court. The Wizbowskis do not controvert evidence produced by the appellee demonstrating that, at the time he represented the

Wizbowskis, their attorney had little expectation that he would return to work at the IRS and had not received an offer of employment or promise of future employment. Their claim thus is little more than pure speculation. Further, to the extent that there was any conflict of interest, this did not involve a plan or scheme to defraud the court. Any conflict at most would be a fraud upon only the Wizbowskis, not the court. Kenner, 387 F.2d at 689; Anderson, 693 F.2d at 846.

III

The Wizbowskis thus fail to demonstrate a fraud upon the court permitting the Tax Court to vacate the 1986 Decision. Having resolved the merits of the appeal against the Wizbowskis, it is unnecessary for the court to reach the question of whether the Wizbowskis' motion for leave to file was filed in a timely manner. The decision of the Tax Court is AFFIRMED.

FILED: November 29, 1993.

Supreme Court, U.S.
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OCT 24 1994
OFFICE OF THE CLERK

No. 94-396

In the Supreme Court of the United States

OCTOBER TERM, 1994

RAYMOND WIZBOWSKI AND BARBARA WIZBOWSKI,
PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner established that the final decision of the Tax Court was procured by fraud upon the court and should therefore be vacated.

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In the Supreme Court of the United States

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-4) is unpublished, but the decision is noted at 12 F.3d 1111. The order of the Tax Court (Pet. App. 5-8) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 29, 1993. The petition for rehearing was denied on May 3, 1994. Pet. App. 9. The petition for a writ of certiorari was filed on August 1, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1985, the Tax Court concluded that petitioners (and other similarly situated taxpayers in a consolidated case) were not entitled to the loss deductions they had claimed for 1977 and 1978 from their investment in a partnership. The court disallowed the deductions because the partnership's alleged purchase of a mobile home park was a sham transaction. *Steinert* v. *Commissioner*, 1985 Tax Ct. Mem. Dec. (P-H) ¶ 85,581, at 85-2601 to 85-2602. In 1986, the court entered its final order determining deficiencies in petitioners' federal income taxes of $28,854 for 1977 and $28,113 for 1978. Pet. App. 5.

In 1991, petitioners moved the Tax Court to vacate its 1986 decision. Petitioners asserted that the attorney who represented them in the Tax Court proceedings—T. Dean Hawkins (who previously had been an employee of the Internal Revenue Service)—had an offer to resume employment with the Service at the time he represented petitioners (Pet. App. 3, 6; CR 17, at 1-2).[1] Petitioners asserted that this alleged, undisclosed conflict represented a fraud on the court.

Petitioners also complained about the fact that Hawkins had cooperated in trying the Tax Court case with Thomas Harris, who was the organizer and promoter of the several partnerships and who represented the other taxpayers in the consolidated case. Peti-

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[1] Petitioners acknowledged that, as early as June of 1988, they were aware that Hawkins had returned to work for the IRS (CR 17, at 14).

"CR" references are to the docket control numbers assigned to the documents comprising the original record by the Clerk of the Tax Court. "RT" references are to the reporter's transcript of proceedings before the Tax Court on March 17, 1992.

tioners claimed that Harris had a conflict of interest in representing the taxpayers at trial in 1985 because a judgment favorable to the government might enhance Harris's personal tax position. See Pet. (14-15). Petitioners asserted that this alleged conflict also represented a fraud upon the court that would justify vacation of the 1986 Tax Court decision (CR 17, at 2, 5).

2. The Tax Court held an evidentiary hearing on the motion to vacate (Pet. App. 5). Hawkins testified that, when he left the Internal Revenue Service in 1981 to open a law practice, he had no assurance or understanding, and little expectation, of any future employment with the Service (RT 10, 12, 16). Larry Boehm, Hawkins's supervisor at the time of his departure, testified that he had never promised future employment to Hawkins or anyone else departing the IRS (RT 82) and had no authority to make such an offer (RT 83). Robert Ray, who contacted Hawkins in mid-1987 about the job that Hawkins ultimately accepted with the Service, testified that he knew of no outstanding agreement between Hawkins and the IRS regarding reemployment (RT 92, 93).

The Tax Court denied the motion to vacate (Pet. App. 5-8). The court concluded that "[t]here is no evidence * * * that Hawkins actually had an outstanding offer of employment from the Internal Revenue Service at the time he represented petitioners in this case, and the preponderance of the evidence negates such an outstanding offer" (*id.* at 6). The court further found that "[t]here is no evidence that Hawkins' expectations about future reemployment by the Internal Revenue Service affected his performance on behalf of petitioners" (*ibid.*) or that respondent's counsel "was aware of Hawkins' expectations or that respondent

received any advantage in this case as a result of Hawkins' expectations" (*ibid.*).

The court noted that "[a] lawyer's inadequate or improper representation of his own client is not a fraud on the Court and does not justify setting aside a final decision" (Pet. App. 6-7). The court further stated that, in any event, "we do not believe that petitioners would be able to secure any different or other result in this case if our prior decision were vacated" (*id.* at 7). The court denied the motion to vacate, concluding that "[i]t would be unfair to respondent, to the Court, and to other taxpayers to reopen this case" (*ibid.*).

3. The court of appeals affirmed (Pet. App. 1-4). The court concluded that petitioners had "fail[ed] to demonstrate that the 1986 Decision was procured through a fraud upon the court" (*id.* at 2). The court explained that petitioners' "claim that their attorney represented them under a conflict of interest does not allege a fraud upon the court" (*id.* at 3, 4 (citing, *e.g.*, *Anderson* v. *Commissioner*, 693 F.2d 844, 846 (9th Cir. 1979); *Kenner* v. *Commissioner*, 387 F.2d 689, 692 (7th Cir.), cert. denied, 393 U.S. 841 (1968)).

The court noted, moreover, that petitioners' claim of fraud lacked an adequate evidentiary basis. It was undisputed that Hawkins had little expectation of returning to work at the IRS and that he had received no offer or promise of employment at the time he represented petitioners (Pet. App. 3-4). The court of appeals concluded that the Tax Court did not err in rejecting petitioners' claim, which rested upon "little more than pure speculation" (*id.* at 4).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other

court of appeals. Further review is therefore not warranted.

1. The Tax Court is not a court of plenary jurisdiction. It has only such jurisdiction as is conferred upon it by the Internal Revenue Code. See *Commissioner* v. *McCoy*, 484 U.S. 3, 7 (1987) (per curiam); *Commissioner* v. *Gooch Milling & Elevator Co.*, 320 U.S. 418, 422 (1943). Under 26 U.S.C. 7481, a Tax Court decision becomes final when it is no longer subject to direct review. *Kenner* v. *Commissioner*, 387 F.2d 689, 690 & n.4 (7th Cir.), cert. denied, 393 U.S. 841 (1968). Once a decision of the Tax Court has become final, neither the Tax Court nor any other court has jurisdiction to reconsider it. *Lasky* v. *Commissioner*, 352 U.S. 1027 (1957) (per curiam), aff'g 235 F.2d 97 (9th Cir. 1956); *R. Simpson & Co.* v. *Commissioner*, 321 U.S. 225 (1944); *Helvering* v. *Northern Coal Co.*, 293 U.S. 191 (1934).

An exception to this finality rule has been recognized by the courts of appeals: the Tax Court may vacate or reopen a decision that has become final if the decision resulted from fraud upon the court. See Pet. App. 2; *Billingsley* v. *Commissioner*, 868 F.2d 1081, 1084 (9th Cir. 1989); *Abatti* v. *Commissioner*, 859 F.2d 115, 119 (9th Cir. 1988). Fraud upon the court occurs when the decision is the result of a corrupt scheme that undermines the integrity of the judicial process and vitiates the court's ability to reach an impartial disposition of the case before it. See *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, 322 U.S. 238, 246, 250 (1944).

Under this standard, the courts have consistently held that a claim that a party's attorney acted under a conflict of interest does not suffice to establish a fraud upon the court. See *Heim* v. *Commissioner*, 872 F.2d 245, 249 (8th Cir. 1989); *Flood* v. *Commissioner*, 468 F.2d 904 (9th Cir.

1972), cert. denied, 411 U.S. 906 (1973); *Kenner* v. *Commissioner*, 387 F.2d at 692; *Chao* v. *Commissioner*, 92 T.C. 1141, 1143 (1989).[2] There is thus no conflict among the courts of appeals on the legal question presented and decided in this case.[3]

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[2] Contrary to petitioners' suggestion (Pet. 10), the decision of the court of appeals in this case does not conflict with *Alexander* v. *Robertson*, 882 F.2d 421 (9th Cir. 1989). In *Alexander*, a party sought relief from an adverse judgment after discovering that his opponent's counsel was not a licensed attorney. The court rejected that application, concluding that fraud upon the court requires proof of a plan "designed to improperly influence the court in its decision." *Id.* at 425. The court of appeals similarly concluded in the present case that petitioners had failed to establish the existence of any plan or scheme to defraud the court (Pet. App. 4).

[3] Petitioners err in relying (Pet. 16-18) on two decisions in which fraud upon the court was found *not* to have occurred. In *Bulloch* v. *United States*, 763 F.2d 1115 (10th Cir. 1985), cert. denied, 474 U.S. 1086 (1986) (Pet. 16-17), the plaintiffs sought to reopen a final judgment by alleging that the government had presented misleading evidence and had pressured witnesses to alter their testimony. The court rejected the plaintiffs' request, reasoning that plaintiffs had "tried their case on the basis of their then best judgment" (763 F.2d. at 1119) and that, in any event, fraud upon the court does not result from "fraud between the parties or fraudulent documents, false statements or perjury" (*id.* at 1121). Similarly, in *Kupferman* v. *Consolidated Research & Mfg. Corp.*, 459 F.2d 1072 (2d Cir. 1972), the court refused to vacate a final judgment awarding damages when it subsequently came to light that the plaintiff's attorney had known at the time of the proceedings, but had failed to disclose, that the plaintiff had executed a release in the defendant's favor that would have served as a complete defense to the action. The court concluded that "it would be going too far to characterize as 'fraud upon the court' his failure to disclose an instrument which he could have supposed reasonably—although, as it now appears, erroneously—to have been known to his adversary." *Id.* at 1081.

2. a. Petitioners' general allegations of fraud upon the court were also properly rejected by the courts below. The evidence at the Tax Court hearing on petitioners' motion to vacate revealed nothing suggesting that deceit or collusion had lessened the integrity of the judicial process. The premise of the motion to vacate was that Hawkins—petitioners' former attorney—had a conflict of interest because he represented petitioners while he assertedly had an outstanding offer of employment from the Internal Revenue Service. After hearing the evidence, however, the Tax Court concluded that no such offer of employment existed (Pet. App. 6). The court of appeals agreed, noting that petitioners' assertions to the contrary consisted of "little more than pure speculation" (*id.* at 4). Moreover, petitioners did not establish that they received inadequate representation at the Tax Court trial in the consolidated case or that any additional or different presentation of evidence at that trial would have altered the result (*id.* at 7-8).

b. Petitioners further contend that Harris—who organized the partnerships whose deductions were at issue—should not have been permitted to represent the taxpayers at the Tax Court trial. They claim that Harris had a conflict of interest because a decision adverse to the taxpayers might have benefitted him personally (Pet. 14-15). Petitioners assert that Harris's joint representation with Hawkins at the consolidated trial therefore represented a fraud upon the court.

Even if Harris had a conflict of interest, his representation of petitioners would not constitute a fraud upon the court. See *Kenner* v. *Commissioner*, 387 F.2d at 692; *Chao* v. *Commissioner*, 92 T.C. at 1143. Moreover, in this case, while Harris may have taken the lead in advocating the allowability of the deductions,

petitioners were separately represented by Hawkins, the counsel of their choice. As petitioners acknowledged in their motion to vacate (CR 17, at 2-3, 13), Harris was representing the other taxpayers; Hawkins represented petitioners (*id.* at 1; see Pet. App. 6).[4]

Moreover, contrary to petitioners' assertion (Pet. 14-15), the economic interests of petitioners and Harris were not inherently distinct. A successful defense by Harris of petitioners' claimed deductions would benefit Harris by eliminating any potential personal liability he might have to the investors who entered the partnerships upon his advice. See RT 99. Petitioners' allegations of a conflict of interest are, in any event, ultimately insufficient because, as the Tax Court stated, there is no basis to "believe that petitioners would [have been] able to secure any different or other result in this case if [its] prior decision were vacated" (Pet. App. 7).[5]

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[4] Tax Court Rule 24(f) provides that, if counsel of record was involved in planning or promoting a transaction or operating an entity connected to any issue in a case, he must either secure the client's informed consent to his representation or withdraw from representation. As the Tax Court noted at the close of the evidentiary hearing (RT 97), that Rule has no bearing in this case because petitioners were not Harris's clients and because the Rule was not adopted until after the trial in this case.

[5] *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, *supra*, on which petitioners rely (Pet. 17), is inapposite. In that patent case, it was discovered after the decision became final that the result had been procured by use of a bogus scientific article that had been published specifically for the purpose of influencing the outcome of the case. Because the court of appeals had been duped by the hoax, this Court set aside the judgment. 322 U.S. at 246. In the present case, by contrast, petitioner has not demonstrated that any false evidence was submitted at the original trial or that a new trial could lead to a different result (Pet. App. 7).

The courts below thus had an adequate evidentiary basis to conclude that the Tax Court's 1986 decision had not been procured by fraud. Further review of that fact-bound conclusion is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1994

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

CASE NO. 94-396

RAYMOND WIZBOWSKI AND BARBARA WIZBOWSKI,

PETITIONERS,

v.

COMMISSIONER OF INTERNAL REVENUE,

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI
FROM THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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In The Supreme Court of the United States

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FOR THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Law Office of Anthony P. Capozzi, on behalf of Petitioners Raymond V. Wizbowski and Barbara Wizbowski, respectfully submit the following reply to the brief in opposition of the Petition for Writ of

Certiorari submitted by Petitioners.

ARGUMENT

1. The Courts below erred in failing to consider attorney Harris' conduct in determining whether there was "fraud on the court" in the Tax Court proceedings.

In denying Petitioners' motion to vacate the prior Tax Court proceedings, the Tax Court determined that attorney Hawkin's undisclosed expectation of I.R.S. employment while representing the Petitioners did not constitute a fraud on the court sufficient to vacate the judgment in those proceedings. (Pet. App. 6-7).

This conclusion by the Tax Court, which was affirmed by the Court of Appeal, is erroneous. Clear error was committed by the refusal of the courts below to consider the conflict of interest inherent in Harris' representation during the Tax

Court proceedings. The courts below have blinded themselves to the serious misconduct of Harris during the Tax Court proceedings, despite evidence on the record of Harris' misconduct, and furthermore, despite an acknowledgment by the Tax Court that Harris' representation violated Tax Court Rule 24(f) (RT 97).

In opposition to the Petition for Writ of Certiorari, the United States argues that Tax Court Rule 24(f) has no bearing in this case because Petitioners were not Harris' clients and because the Rule was not adopted until after the trial in this case. (Opp. 8).

The United States ignores the fact that despite it's effective date, Rule 24(f) refers explicitly to ABA Model Rule of Professional Conduct 1.7, which provides that a lawyer is prohibited from representing a client if the

representation of that client will be directly adverse to another client, or the representation of that client may be materially limited by the lawyer's responsibilities to another client, third parties, or the lawyer's own interest.

Harris, as promoter of the partnership interests in question, had his own personal financial interest in the outcome of the Tax Court proceedings; a financial interest adverse to those of his clients.[1] Hawkins allowed Harris to take

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[1] The United States argues that "a successful defense by Harris of Petitioners' claimed deductions would benefit Harris by eliminating any potential personal liability he might have to the investors who entered the partnerships under his advice (Opp. 8). However, if the courts below would have properly considered Harris' conduct during the tax court proceedings, Petitioners would have shown how Harris ultimately received approximately $2,000,000 as a result of the taxpayer's adverse judgment in the tax court proceedings. Although Petitioners presented evidence in the hearing to vacate that the mobile home park was eventually sold through bankruptcy for $6,000,000, the tax court continued to ignore the misconduct and conflicts of interest inherent

the lead in advocating the allowability of the deductions in the Tax Court proceedings, a fact which is acknowledged by the United States. (Opp. 7). This issue was the crux of the Tax Court proceedings below. (Opp. 2). For the courts below to ignore the egregious misconduct of Harris, and the obvious effect this had on the outcome of the proceedings below is to condone misconduct of an officer of the court of the most egregious kind: having a personal, financial stake in the outcome of the proceedings which is adverse to those of his clients. For the courts below to ignore the fact that an attorney could financially benefit by allowing his clients to suffer defeat at trial is clearly erroneous. This court must exercise it's jurisdiction under these

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in Harris' representation of the taxpayers.

most egregious facts.

The United States attempts to explain away this misconduct by arguing that Petitioners were separately represented by Hawkins, the counsel of their choice. (Opp. 8).

This statement ignores the fact that Petitioners were unaware of the agreement which Hawkins had with Harris during the Tax Court proceedings, and were in fact, unaware that Harris had sole responsibility for, and control over, advocating the allowability of the deductions. (RT 43). After testifying during the Tax Court proceedings, the Petitioners were instructed by Hawkins to go home. (RT 44).

As a result, Petitioners were never made aware of the fact that Harris was solely responsible for Petitioners' success during the Tax Court proceedings.

Petitioner Barbara Wizbowski further testified during the motion to vacate that she would never authorize Hawkins to rely on Harris during the Tax Court proceedings because she had a major conflict with Harris over Harris' mishandling of the Petitioners' pension fund money. (RT 42-43).

While the other taxpayer's may have consented to Harris' representation, the Petitioners were completely unaware that Hawkins had agreed to allow Harris to take the lead as to the main issue in the Tax Court proceedings.

The courts below clearly erred in refusing to examine the misconduct of Harris. As a result, the courts below solely focused on Hawkin's conflict of interest, and in turn, found no fraud on the court. As will be shown below, the egregious facts in the present case,

involving the representation of Petitioners in the Tax Court proceedings, constitute a fraud on the court which justifies a vacation of the Tax Court decision.

2. In opposition to Petitioners' Petition for a Writ of Certiorari, the United States argues that Harris' representation of the Petitioners during the Tax Court proceedings at issue did not constitute a fraud on the court.

The Tax Court below acknowledged a conflict of interest between Harris and Petitioners. (RT 97). The United States however, argues that a conflict of interest existing between attorney and client does not constitute a fraud on the court, citing Heim v. Commissioner, 872 F.2d 245, 249 (8th Cir. 1989); Flood v. Commissioner, 468 F.2d 904 (9th Cir. 1972), cert. denied, 411 U.S. 906 (1973);

Kenner v. Commissioner, 387 F.2d 689, 692 (7th Cir.), cert. denied, 393 U.S. 841 (1968); and Chao v. Commissioner, 92 T.C. 1141, 1143 (1989). (Opp. 7-8).

The above cases demonstrate a recognition by the courts that an allegation of attorney misconduct, merely amounting to negligence, does not constitute a fraud upon the court. See Heim v. Commissioner, 872 F.2d at 248; Kenner v. Commissioner, 387 F.2d at 692; Chao v. Commissioner, 92 T.C. at 1143.

In essence, fraud on the court is not found where the client, and not the court, is alleged to have been the only victim of the fraud. See Heim v. Commissioner, 872 at 248; Stickler v. Commissioner, 464 F.2d 368, 370 (3d Cir. 1972); Toscano v. Commissioner, 441 F.2d 930, 933 (9th Cir. 1991).

To constitute fraud on the court, it

is necessary to show a deliberately planned scheme designed to improperly influence the court in its decision. See Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 64 S.Ct. 997, 88 L.Ed. 1250 (1944).

The United States however, and the courts below, are ignoring the conflict of interest inherent in Harris' representation of Petitioners in the Tax Court proceedings. The conflict of interest which Petitioners are alleging on behalf of Harris is not mere negligence or inadequate representation.

Hawkins did not inform the Petitioners that Harris would be solely responsible for advocating the allowability of the deductions in issue. This allowed Harris to steer the Tax Court proceedings in a manner which benefitted him personally, to the detriment not only

of his clients, but to Petitioners, who were not even aware that their fate was in Harris' hands.

Here, Petitioners allege that Harris, as the General Partner of the partnership, and the lead attorney in the Tax Court proceeding, had a substantial financial interest in the outcome of the litigation, adverse to that of the Petitioners. (Pet. 14-15). Unknown to Petitioners, or the Tax Court, Harris stood to gain $2,000,000 by losing the Tax Court case.

At issue in the Tax Court proceedings were the Petitioners' entitlement to loss deductions for the partnership formed and promoted by Harris. The Petitioners, along with the other limited partners of the partnership, lost the Tax Court case based on a finding that the partnership's purchase of the mobilehome park was a sham

transaction.[2] Steinert v. Commissioner, 1985 Tax Ct. Mem. Dec. (P-H) 85, 581, at 85-2601 to 85-2602.

However, the interests of Petitioner in the Tax Court proceedings were dissimilar to the interests and claims of Harris and the partners he represented. Unlike the other limited partners of the partnership, Petitioners sold their partnership interest to Harris in 1979, when Petitioners began to distrust Harris. Petitioners recaptured the prior partnership losses on their 1979 tax return and paid a tax on the gain from the sale of their partnership interest. Despite the fact that Petitioners had already recaptured the loss and paid tax

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[2] Unknown to the partnership, Harris personally purchased the mobilehome park, marked up the price, then sold the mobilehome park to the partnership, naming Harris' company as the general partner.

on the gain, the I.R.S. disallowed the prior loss deductions of the partnership, including those taken by Petitioners, and assessed a tax on Petitioners.

Unlike the other partners of the partnership, who presumably paid their tax and penalties from their gain on the eventual sale of the mobilehome park, Petitioner was not a partner and did not share the benefit of that sale. It was because of the prior sale of Petitioners' interest in the partnership, and their recapture of the loss and tax on the gain, that Petitioners sought representation by Hawkins. However, it was Harris, not Hawkins who ostensibly represented Petitioners.

It was the undisclosed financial interest of Harris in the outcome of the Tax Court proceedings, and the obvious reluctance of Hawkins to defend

Petitioners interests in the face of a job offer with the I.R.S., which undermined the very integrity of that judicial process, rendering Petitioners, and the Tax Court, victims of the deception and fraud occasioned by these adverse, undisclosed interests.

The Supreme Court has defined fraud on the court in terms of whether the alleged misconduct "harms" the integrity of the judicial process:

"Tampering with the administration of justice...involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society. Surely it cannot be that preservation of the integrity of the judicial process must always wait upon the diligence of litigants. The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud." Hazel-Atlas Glass Co. v. Hartford Empire Co., 322 U.S. 238, 246 64 S.Ct. 997, 1001, 88 L.Ed. 1250 (1944).

If the courts below had considered the effect of Harris' participation in the Tax Court proceedings, and on the adverse outcome to the Petitioners, "fraud on the court" as set forth by this court above, would have been found. The courts below erred in refusing to take Harris' representation of Petitioners into account.

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Respectfully Submitted,

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